Supreme Court, U.S.
FILED
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NO. 06-730

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON; ROB MCKENNA, ATTORNEY GENERAL; SAM REED, SECRETARY OF STATE,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; MICHAEL YOUNG; DIANE TEBELIUS; MIKE GASTON; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS; WASHINGTON STATE GRANGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

1. This Case Concerns Core Issues Of State Sovereignty

In response to the State's petition, the Republican, Democratic, and Libertarian Parties have each filed a brief in opposition to the State of Washington's petition for a writ of certiorari in this case.[1] All three of the political party briefs ignore the standards for granting review and proceed to argue the merits of the underlying case. Republican Br. at 12-17 (asserting that the circuit court's decision in this case is consistent with the case law in this Court); Democratic Br. at 10-17 (asserting that the circuit court correctly applied *California Democratic Party v. Jones*, 530 U.S. 567 (2000); Libertarian Br. at 4-10 (asserting, again, that the Ninth Circuit decision is consistent with the *California Democratic* case).

The political parties appear to concede, by their silence on the point, that this case presents a fundamental question concerning state sovereignty: the extent to which a state may structure its process for electing its state officers and its representatives in the United States Congress, including defining the role of political parties in the state election process.

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[1] The Republican and Democratic Parties filed separate briefs in opposition to the State of Washington's petition (No. 06-730) and to the parallel petition of the Washington State Grange (No. 06-713). The Libertarian Party filed a single response to both petitions.

This Court often declines to review lower court decisions unless there is a conflict among the federal circuits or a conflict involving decisions of state courts. However, this Court has often made exception and granted review of decisions involving broad questions of state election policy, such as this case. Indeed, one such important case is directly involved here: *California Democratic Party v. Jones*. This Court granted review of California's 1998 "blanket" primary, which had been upheld by the lower courts. *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999). No other circuit court (or highest state court) had ruled inconsistently. Yet this Court recognized the importance of deciding an issue involving both the sovereign policy choices a state may make with respect to its election system and the freedom of speech and association rights of private parties.

Similarly, this Court granted review of a state court decision concerning the constitutionality of term limits for federal officers, without waiting to see if a conflict would development among the lower courts. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). As the Court observed: "The State of Arkansas, by its Attorney General, and the intervenors petitioned for writs of certiorari. *Because of the importance of the issues*, we granted both petitions[.]" *Id.* at 786 (italics added).

A third case in which this Court granted review without a conflict in circuit decisions was *Clingman v. Beaver*, 544 U.S. 581 (2005). In

Clingman, the Court reversed a circuit court decision invalidating a feature of Oklahoma's primary nominating system.

This case, like the three cases just cited, involves a state's fundamental options in deciding the essentials of the structure of state government. States as sovereign entities have the prerogative to determine who their officers will be and how those officers will be selected, provided that a state may not impair rights guaranteed by the Constitution of the United States. Although states may not impair the constitutional rights of political parties as private organizations, states have broad authority to determine the role political parties will play in the state election system and in the conduct of state government. As in Clingman, the issue here concerns establishing the boundary between the way political parties prefer to exercise their choices as private organizations and the policies a state might adopt in structuring the public process of electing officers.

In this case, the issue is related to but unresolved by *California Democratic Party* and is at least as important as the term limits issue considered in *Thornton*. Washington's primary election system allows all voters to vote for any candidate and advances the top two candidates to the general election ballot, without regard to party affiliation. The question here is whether this state's choice is constitutionally foreclosed because candidates are permitted to identify their political

party preference, if any, on the primary election ballot. This question implicates core interests of the state—encouraging broad participation in its primary election system and providing relevant information to voters. From the political parties' perspective, it raises important issues of free association. Whether, as the State and the Grange assert, the Ninth Circuit erroneously removed this policy choice from Washington or whether, as the political parties assert, their First Amendment interests foreclose Washington's choice, the importance of the issue justifies granting review.

2. The Constitutional Leeway Of The States To Structure Their Primary Election Systems Is Unsettled, And States Deserve Guidance From This Court

In their briefs, the political parties argue, in effect, that a state may not choose a primary election system that eliminates party nomination as the determinative factor in selecting candidates for the general election ballot if the system allows the candidate to identify the *candidates'* party preference, if any, on the ballot. The political parties erroneously equate the candidate's statement of his or her party preference, if any, with nomination by the party and term such a primary system "partisan". The parties then allege that they are entitled to full control of "their" party nominations. Democratic Br. at 10 ("the state must allow each political party to select its candidates"); Libertarian Br. at 9 ("Once a State opts for a partisan election

system, it must protect the integrity of party labels.") Their arguments, largely supported by the reasoning of the lower court decisions in this case, leave states essentially only two options in setting up their elections systems: (1) allow no ballot information to voters concerning the *candidates'* party preference, or (2) conduct a party nominating primary where voters are limited in the candidates for whom they may vote and where party nomination determines who advances to the general election.

It seems anomalous that states have no other options, since the structuring of a state's election system is a core state function, and *California Democratic Party* suggests otherwise. In Initiative 872, the people of Washington crafted an election system which gives candidates the option of informing voters of the candidates' political preferences, but without surrendering control over the nominating process to the political parties. A state should have the option of designing an election system that reflects the policy choices of the state's voters concerning broad voter participation in each stage of the election process, so long as those policy choices respect the constitutional rights of all citizens. In this case, Washington respects the rights of parties and all other private organizations to decide which candidates to support but divorces this private process from the nomination system.

The lower courts have misconstrued the fundamental nature of the system adopted in Initiative 872 and have failed to give appropriate

deference to a sovereign state's choice in the structuring of its elections. On matters relating to such a core state function, this Court should grant review and clarify the law for Washington and all states.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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